Illinois Bell Telephone Company *and* Gloria P. Conley and Carol Gilbert. Case 13-CA-18445

March 27, 1981

DECISION AND ORDER

On February 25, 1980, Administrative Law Judge George F. McInerny issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings,[1] findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

The issue presented is whether Union Shop Steward Conley and Executive Board Member Gilbert exceeded the bounds of permissible conduct in protesting Respondent's overtime policies, thus justifying Respondent's warnings to these employees. The Administrative Law Judge found, and we agree, that Conley and Gilbert were engaged in lawful protected activity.

The facts are accurately set forth in the Administrative Law Judge's Decision. Following a storm beginning on January 1, 1979,[2] Respondent asked employees to work overtime because of increased work combined with fewer employees reporting to work. The overtime requests did not meet Respondent's needs so it then ordered people who were on duty to remain at work.

There is a dispute as to whether involuntary overtime had previously been required at the Hansen Park office, but the resolution of that issue is not crucial to a determination of the merits of this case. It is clear that the collective-bargaining agreement does not specifically cover this type of emergency situation. The record does not reveal how many Hansen Park employees were required to work overtime, but several employees complained to Conley and Gilbert. On January 1, Gilbert prepared and posted on the employees' bulletin board a sign which read:

OVERTIME IS VOLUNTARY

If you are *asked* to work overtime you can refuse.

If you are *ordered* by management to work overtime ask for a union representative to be present at once!!

Carol Gilbert
1/1/79

Mandatory overtime continued and employees continued to complain to Gilbert and Conley. On January 4, Conley posted the following notice:

Mandatory overtime must be on schedule Thursday at contractual posting time.

You do not have to work overtime that is not on the schedule. If any management person tells you different ask for your Union Representative to be present.

We will greive [sic] the incidents that have occurred this weekend.

Gloria Conley

On January 6, Conley, Gilbert, and Union Vice President Hamilton prepared a document which they distributed to employees. The leaflet read, in pertinent part, as follows:

KEEP OVER-TIME VOLUNTARY!

In some operator offices management is trying to bully people into working involuntary overtime. Management is threatening operators with being marked absent if they don't work overtime when ordered. Many people are refusing anyway. We think they are right.

Its a long standing "past practice" that management must schedule operator overtime it wants on the Thursday schedule, a week in advance. The contract nowhere gives management the right to force us to work hourly overtime on the same day its assigned. Management admits this. If management asks you to work overtime you have the right to refuse. If management orders you to work overtime you don't want, demand to see your union representative at once . . . .

Respondent prevented the distribution of these leaflets and warned Gilbert and Conley on January 19 and 26, respectively, not to repeat their conduct

[1] Respondent has excepted to the Administrative Law Judge's refusal to grant its motion to sequester Carol Gilbert during Gloria Conley's testimony. We find that the Administrative Law Judge acted within his discretion under the guidelines of *Unga Painting Corporation*, 237 NLRB 1306 (1978), in allowing Gilbert to remain in the hearing room. Respondent correctly notes that the *Unga* decision modified the longstanding Board policy of refusing to sequester witnesses who were alleged discriminatees, holding that such witnesses should be excluded from the hearing room only while others of General Counsel's or the charging party's witnesses are testifying about events to which the discriminatee has testified or may testify. However, *Unga* further provides that an administrative law judge may consider the special circumstances of a case and permit a witness to be present throughout or totally excluded from the hearing when not testifying. Herein, neither Gilbert nor Conley is an alleged 8(a)(3) discriminatee (as this case involves only allegations of violations of Sec. 8(a)(1)), but both are named charging parties, had entered appearances at the hearing, and were proceeding *pro se*. Each testified not only about matters of common involvement, but to a great extent about their separate meetings with Respondent, individual knowledge about Respondent's overtime policies, and their separate endeavors to counter Respondent's action. We agree with the Administrative Law Judge that *Unga* does not dictate Gilbert's removal from the hearing during Conley's testimony. In any event, their testimony concerning Respondent's past practice has no bearing on our decision.

[2] All dates hereinafter refer to 1979.

which Respondent considered as instigating a refusal to work overtime. In addition Conley was warned that further leaflet distribution might lead to discipline possibly resulting in discharge.

The Administrative Law Judge found that Respondent violated Section 8(a)(1) of the Act by disciplining Conley and Gilbert because they were engaged in lawful, protected, concerted activity in protesting the Respondent's imposition of mandatory overtime.

Respondent argues that the Charging Parties' activities in protest of the overtime policies lost the protection of the Act because the Charging Parties advocated an unprotected partial strike. We disagree.

To find that Conley and Gilbert urged employees to refuse to work mandatory overtime would ignore the testimony of Conley and Gilbert as to their intent and the plain meaning of the notices. In all three notices, employees are told to ask for a union representative if they are ordered to work overtime. This instruction must be contrasted with the advice that employees *can refuse to work involuntary overtime.* Respondent seizes upon a few sentences in the January 5 leaflet—*to wit*: "Management is threatening operators with being marked absent if they don't work overtime when ordered. Many people are refusing anyway. We think they are right"—to argue that the leaflet endorses conduct by employees who have refused to obey a direct order to work overtime, and additionally encourages them as well as others to repeat such conduct. This interpretation disregards the context in which the statements were made. The January 5 leaflet basically protested Respondent's alleged change in overtime policy as contrary to past practice and the contract. Whether or not the protesters were correct in their opinion is not relevant; the activity is protected. Although the leaflet states in one part that Conley and Gilbert believed that employees who refused overtime were right, any implication that they encouraged employees to refuse mandatory overtime is dispelled by the unequivocal statement that employees who are ordered to work overtime should demand to see their union representatives.

There is no doubt that Conley and Gilbert had a protected right to protest Respondent's alleged change in overtime policies. This protection may be lost when the evidence demonstrates that they induced employees to engage in a work stoppage that is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike.[3] Here, any such inference is unwarranted. The record contains no evidence of any refusals to work involuntary overtime and the single statement that Conly and Gilbert believed that certain employees were right in refusing overtime cannot reasonably be expanded as sounding a clarion call for future recurrent partial work stoppages. Thus, *John S. Swift Company, Inc.*, 124 NLRB 394 (1959), and *Honolulu Rapid Transit Company, Limited*, 110 NLRB 1806 (1954), are inapposite, for in those cases the employer was aware that the employees had decided to adopt the tactics of recurrent or intermittent walkouts as a means of forcing concessions in bargaining. To find such intent on the basis of the January 5 leaflet would require us to abandon logic and to engage in sophistry. We are unwilling to deprive Conley and Gilbert of their Section 7 rights on that basis. Accordingly, we adopt the conclusions of the Administrative Law Judge.

[3] See *McGaw Laboratories, a Division of America Hospital Supply Corporation*, 206 NLRB 602 (1973); *Polytech, Incorporated*, 195 NLRB 695 (1972).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Illinois Bell Telephone Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

GEORGE F. MCINERNY, Administrative Law Judge: Based on a charge filed on February 15, 1979, by Gloria P. Conley and Carol Gilbert, individuals, referred to herein as the Charging Parties, the Acting Regional Director for Region 13 of the National Labor Relations Board, herein referred to as the Board, issued a complaint dated March 30, 1979, alleging that Illinois Bell Telephone Company, herein referred to as the Company, or Respondent, had issued warnings to the Charging Parties because they had engaged in activities protected by Section 7 of the National Labor Relations Act, as amended, herein referred to as the Act, in violation of Section 8(a)(1) of the Act. Respondent filed an answer to the complaint denying the commission of any unfair labor practices.

Pursuant to notice contained in said complaint, a hearing was held before me in Chicago, Illinois, on July 23, 1979, at which all parties appeared and were given full opportunity to present testimony and documentary evidence, to argue orally, and to submit briefs. Following the close of the hearing, briefs were submitted by the General Counsel and Respondent. These have been carefully considered.

Upon the entire record in this case, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Illinois Bell Telephone Company is an Illinois corporation engaged in the business of providing telephone service from a number of locations, including its facility at 5604 West Beldon Street, Chicago, Illinois, the only location involved in this case. During the calendar year immediately preceding the issuance of the complaint, Respondent received gross revenues in excess of $100,000, and received goods and services valued in excess of $50,000 at its Illinois locations directly from points outside the State of Illinois. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Employees in the Company's Operator Services Organization are represented for purposes of collective bargaining by various local unions of the Communications Workers of America. The employees involved in this case are employed as directory assistance operators at the Company's Hansen Park[1] office in the city of Chicago, and are represented by Local 5016 of the Communications Workers Union. Local 5016, with a number of other locals representing employees in company offices throughout the State of Illinois, is a part of the Union's District 5, which in turn has negotiated with the Company on behalf of these locals for some years. Since 1974, District 5 and the Company have negotiated consolidated agreements covering employees represented by Locals 5001 through 5016 and covering all but two of the Company's offices. The latest collective-bargaining agreement is for a term of 3 years, from August 7, 1977, to August 9, 1980.

B. *The Concerted Activity*

Gloria Conley had worked for the Company as a directory assistance operator for about 5 years as of January 1979.[2] From 1976 through January 9, 1979, she also served as shop steward and delegate for Local 5016 at the Hansen Park office. Carol Gilbert had been a directory assistance operator for over 6 years as of January 1979, and she was also a member of the Executive Board of Local 5016 from 1976 through January 9, 1979.

Beginning on January 1, 1979, the city of Chicago was struck with a severe snow storm, the effects of which continued for some days. According to the testimony of Division Manager Gerald Goris, the number of directory assistance (information) calls increased because of the storm. At the same time many employees were prevented by weather conditions from getting to work. In order to handle the calls, the Company, in accordance with its policy, first asked those who were working to remain on overtime to assist. Apparently this was not enough, so the Company then ordered people who were on duty to remain at work.

The collective-bargaining agreement does not specifically cover this type of emergency situation. Article 9 of the contract provides for the posting of working schedules, showing all hours of work, by 3 p.m. on Thursday of the previous week. There was general agreement that the Company could and did assign involuntary overtime and holiday assignments by means of this pre-posted schedule, but on the right of the Company to assign overtime on an involuntary basis, there was considerable disagreement. Inez Roberts, a supervisor, testified that the Company did have the right to assign involuntary overtime, and cited an instance where, after a Chicago Transit Authority train had crashed on February 4, 1977, she assigned operators to work regardless of their wishes. William Day, a district manager of labor relations, cited a grievance settlement reached on March 30, 1978, where the Union agreed to the principle of involuntary overtime, but required that assignments of such overtime be made in inverse order of seniority.[3] Conley and Gilbert testified, however, that involuntary overtime had never been required at the Hansen Park office, including the day of the CTA crash.

It is unclear in the record how many of the Hansen Park employees were required to work overtime, but some were and they complained of this to Conley and Gilbert, beginning on January 1. On that date Gilbert prepared and posted on the employees' bulletin board, a hand-lettered sign which read:

> OVERTIME IS VOLUNTARY!
>
> If you are *asked* to work overtime you can refuse.
>
> If you are *ordered* by management to work overtime—ask for a union representative to be present at once!!
>
> Carol Gilbert
> 1/1/79

There is no indication in the record that Gilbert had consulted with any higher union officials before she put up the sign.

The mandatory overtime continued after the posting of this notice, and employees continued to complain, not only to Gilbert, but also to Conley. The latter then posted another handwritten notice on January 4, reading as follows:

> 1/4/79
>
> per Anna O'Malley
> and Hermolene Saxton[4]

[1] The office is referred to in the record as "Hanson" Park, but is described in Respondent's brief as "Hansen" Park. I rely on the brief and assume the latter to be the correct spelling.

[2] All dates herein are in 1979 unless otherwise indicated.

[3] Neither of these instances, however, involved the Hansen Park office.

[4] O'Malley was the outgoing president of Local 5016 and Saxton was her successor, who would take over as president on January 9.

Mandatory overtime must be on schedule Thursday at contractual posting time.

You do not have to work overtime that is not on the schedule. If any management person tells you different ask for your Union Representative to be present. We will greive [sic] the incidents that have occurred this weekend.

Gloria Conley[5]

Conley did not testify that she talked to either O'Malley or Saxton before preparing and posting this notice. Neither of these union officers were called upon to testify. Further, there is no testimony that any employees refused to work overtime. Nor is there any evidence that any employee was confronted with a demand to work overtime and summoned a union representative to be present.[6]

On January 5, Conley and Gilbert, together with a vice president of Local 5016, Annie Hamilton, drew up a document which they began passing out to other employees on nonworking time in nonworking areas.[7] The leaflet read, in pertinent part, as follows:

KEEP OVER-TIME VOLUNTARY!

In some operator offices management is trying to bully people into working involuntary overtime. Management is threatening operators with being marked absent if they don't work overtime when ordered. Many people are refusing anyway. We think they are right.

Its a long standing "past practice" that management must schedule operator overtime it wants on the Thursday schedule, a week in advance. The contract nowhere gives management the right to force us to work hourly overtime on the same day its assigned. Management admits this. If management asks you to work overtime you have the right to refuse. If management orders you to work overtime you don't want, demand to see your union representative at once . . . .

This leaflet was signed by Conley, Gilbert, and Hamilton. Again, there is no indication of higher level consultation in its preparation.

C. *Management Reaction*

When Conley and Gilbert commenced distributing their leaflet on January 5 or 6 they were restrained by various supervisors, copies were taken away from employees who had received them, and copies which had been left in the cafeteria for distribution to employees were confiscated by supervisors. At least one employee was told by a supervisor that she could not read it, and that it was "against the law." Conley herself was told by Supervisor Gerry Pinek that the leaflets were against the law.[8]

Next, both of the Charging Parties were interviewed by Division Manager Goris: Gilbert on January 19 and Conley on the January 26. While there are some disparities in the versions of what occurred at these interviews it is undisputed that each employee was told in advance that the interview might involve discipline; that Goris readily acceded to the presence of the new shop steward, Susan Magee; that during the course of the interviews each employee was told that they were guilty of instigating a refusal to work overtime; and each was warned not to repeat this conduct under pain of discipline. Conley was told, in addition, that any repetition of the leaflet distribution might lead to discipline up to her discharge. It is further undisputed that Goris made notes during the interviews which he testified he still retains in his desk.

D. *Analysis and Conclusions*

It is evident from a review of the collective-bargaining agreement between District 5 and the Company, that there is no clear provision for mandatory, nonvoluntary overtime. Section 9, mentioned above, does require scheduling to be posted by Thursday of the preceding week. Section 7 requires the Company to observe seniority in respect to hours of work, and Section 1.03 is a fairly standard management-rights provision retaining for management the right to determine work requirements and to assign working forces. In the absence of specific contractual guidelines the policy relative to mandatory overtime may be discovered, if there is such a policy, in the practice of the parties to the agreement. I am urged by Respondent to find that this practice was, as stated by Supervisor Roberts, to ask first for volunteers, and, failing that, to require that employees work the overtime. Roberts at first was only able to recall one prior instance where involuntary overtime was required, and her memory of the practice at Hansen Park was rather attenuated, referring to some date or dates in 1976 when involuntary overtime was required. William Day, the district manager for labor relations, testified about the settlement of a grievance with a district representative of the Communications Workers Union in 1978. He stated that the contract applied to 57 of the 59 offices of the Company, and that, in the grievance settlement, the question of the right of the Company to assign involuntary overtime was admitted by the Union.

Conley and Gilbert, on the other hand, testified that employees at Hansen Park had never been required to work involuntary, or "last-minute" overtime. No other employee or supervisor testified as to the practice at Hansen Park.

In the circumstances of this case the evidence does not convince me that the past practice claimed by Respondent has been established. While there has been a single contract, at least since 1974, covering a number of offices within the jurisdiction of a number of local unions and while the Company understandably wished to effect uni-

[5] Both of these notices were removed from the bulletin board by management. There is no allegation in the complaint that that action involved a violation of law.

[6] A grievance on this was filed, but was "dropped" after being denied at the first level of the grievance procedure.

[7] Respondent does not claim otherwise.

[8] There are no allegations in the complaint that any of this was unlawful.

formity in interpretation in all of its offices, it cannot escape the fact of preexisting and continuing diversity in practice among its different locations. This is particularly true where, as here, the issue arises only under the most extraordinary circumstances. I thus credit Conley and Gilbert and find that, in their experience at Hansen Park, there had never been an instance of forced overtime.[9] This is not necessarily inconsistent with Roberts' memory of one such instance in 1976 since Conley and Gilbert may have been off duty or otherwise unaware of the incident. It follows then that I find that the activities of Conley and Gilbert did not advocate violation of the contract by the Hansen Park employees.

Additionally, an analysis of the notices posted individually by Conley and Gilbert, as well as the jointly authored leaflet, shows that nowhere did they advocate a partial strike or concerted, or individual, work stoppages. Their recommendations were that employees demand union representations if ordered by management to work overtime. The leaflet did recommend also that employees refuse involuntary overtime, but the Company itself admitted that involuntary overtime could be refused. There was no contract violation in that. The Company was also concerned about the rhetoric in other parts of the leaflet. The language of the leaflet may exhibit a lack of sympathy with some of the Company's employment practices, but the language does not approach the level where it could be considered unprotected. *Firehouse Restaurant*, 220 NLRB 818 (1975).

I find, then, that Conley and Gilbert, by posting notices and by preparing and distributing the leaflet, were engaged in lawful protected concerted activity. It follows that the Company's admitted discipline of these employees, mild though it may have been, and imposed with the good-faith but mistaken belief that Conley and Gilbert were advocating violations of the contract, itself violated Section 8(a)(1) of the Act. *Veeder-Root Company, a Division of Western Pacific Industries, Inc.*, 237 NLRB 1175 (1978).

III. THE REMEDY

Having found that Respondent Illinois Bell Telephone Company has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully issued warnings to its employees Gloria P. Conley and Carol Gilbert, I shall recommend that Respondent remove such warnings from its records.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent has violated Section 8(a)(1) of the Act by issuing disciplinary warnings to Gloria P. Conley and Carol Gilbert.

3. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

The Respondent, Illinois Bell Telephone Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Issuing written or oral warnings to employees for engaging in concerted activities for their mutual aid or protection.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Expunge from its files any references to the warnings issued to Carol Gilbert on January 19, 1979, and to Gloria P. Conley on January 26, 1979.

(b) Post at its location at Hansen Park, Illinois, copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representatives, shall be posted immediately upon receipt thereof and be maintained by Respondent for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

[9] The fact that no supervisory personnel testified to the contrary is significant to this finding.

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[11] In the event that his Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Act."

WE WILL NOT issue warnings to our employees for engaging in concerted activities for their mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by law.

WE WILL expunge from our records any references to warnings issued to Carol Gilbert on January 19, 1979, and to Gloria P. Conley on January 26, 1979.

ILLINOIS BELL TELEPHONE COMPANY